



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

OCT 20 2004

FIRST CLASS MAIL

Lyn Utrecht, Esq.
Ryan, Phillips, Utrecht & Mackinnon
1133 Connecticut Avenue, NW
Washington, DC 20036

RE: MURs 5403, 5427, 5440
The Media Fund

Dear Ms. Utrecht:

On January 23, 2004, March 17, 2004 and April 7, 2004, the Federal Election Commission notified your client, The Media Fund, of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). Copies of the complaints were forwarded to your client at that time.

Upon further review of the allegations contained in the complaints, the Commission, on September 14 and 29, 2004, found that there is reason to believe that The Media Fund violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office

questions within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for

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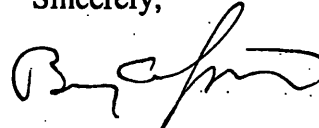
pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Goodin, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: The Media Fund

MUR: 5403, 5427, 5440

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7 **I. INTRODUCTION**

8 These matters were generated by a complaint filed with the Federal Election Commission
9 (“the Commission”) by the Center for Responsive Politics, the Campaign Legal Center, and
10 Democracy 21, and two complaints filed by Bush-Cheney ‘04, Inc. *See* 2 U.S.C. § 437g(a)(1).
11 The three complaints received by the Commission allege that The Media Fund (“TMF”) is
12 violating federal campaign finance laws by spending millions of dollars, raised outside the
13 limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended (the
14 “Act”), to influence the upcoming presidential election. The complaints also allege that TMF is
15 failing to report properly its activities to the Commission. Finally, the complaint in MUR 5440
16 alleges that TMF has coordinated its activities with John Kerry for President, Inc. and
17 Democratic party committees.

18 TMF argues in response to the complaints that, as a matter of law, its activities do not
19 result in violations of the Act. Generally, TMF asserts that it is not a “political committee”
20 because it has not made more than \$1,000 in “expenditures,” as defined under the Act.
21 Therefore, it contends that it is not required to report its receipts and disbursements nor to adhere
22 to the Act’s limitations and prohibitions on contributions. In response to the complaint in MUR
23 5440, TMF also denies coordinating its activities with federal candidates and national party
24 committees.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. FACTS**

3 TMF has not registered as a “political committee,” nor is it associated with any registered
4 political committee. In its initial filing of Form 8871 with the IRS as a 527 organization on
5 November 6, 2003, TMF states that its purpose is “[t]o communicate with the public on issues
6 that relate to the election of candidates for federal, state or local office or the legislative process
7 in a manner that does not expressly advocate the election or defeat of a particular candidate.”

8 Notwithstanding this suggestion of a broad organizational mandate, TMF’s website,
9 advertisements, and fundraising solicitations all point to an intention to influence the 2004
10 presidential election. For example, TMF’s website emphasizes its goal of “ensur[ing] that a
11 Democratic message focused on issues of concern to all Americans will be on the air during the
12 critical period between the end of the primaries and the Democratic Convention when the
13 Republicans’ financial advantage is greatest.” Although TMF claims that its advertisements help
14 define issues for local, state, and federal elections, all of the advertisements of which the
15 Commission is aware clearly identify George Bush, John Kerry, or both, and either attack (or
16 oppose) George Bush, or promote John Kerry while attacking George Bush.

17 Moreover, while TMF’s stated goal on its website of airing its “Democratic message”
18 refers to “issues of concern,” there is no context other than the presidential election in which it
19 would make any sense to posit that “the Republicans’ financial advantage is greatest” “between
20 the end of the primaries and the Democratic Convention.” First, the “end of the primaries” must
21 refer to the presidential primaries, because several states’ Congressional, state, and local
22 primaries are actually *after* the Democratic convention. Second, the “Republicans’ financial
23 advantage” must refer to the presidential campaign, because there is nothing unique about the

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1 period between the primary and the convention that would affect the competitive balance
2 between the parties.

3 To fund its advertisements and public communications, TMF raises money through the
4 Joint Victory Campaign 2004 ("JVC 2004"), a joint fundraising enterprise between TMF and
5 America Coming Together, whose online solicitation states:

6 **Donate to the Victory Campaign 2004 Today!**

7 Yes! I want to help change the course of the country away from those who
8 support the Bush Republican radical agenda and help deliver victories at
9 the local, state, and federal level across the country. I am committed to
10 Victory Campaign 2004's unprecedented national strategy to support an
11 aggressive and innovative grassroots program combined with a
12 sophisticated and powerful media to expose the real Bush Republicans and
13 foster a discussion of the issues that are vital to this nation. I understand
14 that Victory Campaign 2004 exclusively supports the work of America
15 Coming Together and The Media Fund. Please use my contribution to
16 communicate a strong message to define the issues for 2004 local, state,
17 and national elections and create a wave of political change.

18 JVC 2004 transferred \$12.775 million to TMF in the first quarter of 2004 and over \$9 million in
19 the second quarter of 2004. Much of these funds came from contributions that exceeded the
20 \$5,000 statutory limit, *see* 2 U.S.C. § 441a(a)(1)(C), or were contributions from corporations. It
21 is unclear if TMF raises any funds through solicitations that do not involve JVC 2004.

22 Due at least in substantial part to the funds received from JVC 2004, TMF reportedly
23 spent more than \$24 million on advertisements in "swing states" between mid-March and late
24 May, including \$2.4 million in advertisements in Florida. According to electioneering
25 communications reports filed with the Commission, TMF has received over \$7.8 million and
26 spent over \$9.3 million in disbursements for television advertisement buys since August 2004.

27 The advertisements funded by TMF include the following statements:

- “George Bush’s priorities are eroding the American dream. It’s time to take our country back from corporate greed and make America work for every American.”
- “George W. Bush is taking our country in the wrong direction. It’s time to make America work for every American.”
- “When it comes to choosing between corporate values and family values, face it, George Bush is not on our side.”

TMF ran its advertisements in the same television markets and at similar times as the Kerry campaign during the first quarter of 2004.

TMF hired the Thunder Road Group to provide it with consulting services on public communications. Jim Jordan, who served as John Kerry’s campaign manager until November 9, 2003, created the Thunder Road Group shortly after leaving the Kerry campaign. Jordan also has been quoted as a spokesman for TMF.

B. ANALYSIS

1. Summary of the law

The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). The term “contribution” is defined to include any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2nd Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).

1 Under the Act, an expenditure made by any person "in cooperation, consultation, or
2 concert, with, or at the request or suggestion of" a candidate or party committee constitutes an in-
3 kind contribution. *See* 2 U.S.C. §§ 441a(a)(7)(B)(i) and (ii). The regulations that implement the
4 preceding statutory provisions define "coordinated" and prescribe the treatment of a
5 "coordinated" expenditure as an in-kind contribution. *See* 11 C.F.R. § 109.20(a) and (b).

6 Although the definition of "coordinated" in Section 109.20 potentially encompasses a
7 variety of payments made by a person on behalf of a candidate or party committee, many issues
8 regarding coordination involve communications. The Commission has promulgated separate
9 regulations addressing "coordinated communications." 11 C.F.R. §§ 109.21-109.23. A
10 communication is coordinated with a candidate, an authorized committee, a political party
11 committee, or agent thereof if it meets a three-part test: (1) the communication is paid for by a
12 person other than a candidate, authorized committee, political party committee, or agent thereof;
13 (2) the communication satisfies at least one of the four "content" standards described in Section
14 109.21(c); and (3) the communication satisfies at least one of the six "conduct" standards
15 described in Section 109.21(d).

16 The "content" standards include: (1) an "electioneering communication"; (2) a "public
17 communication" that disseminates campaign materials prepared by a candidate; (3) a
18 communication that "expressly advocates" the election or defeat of a clearly identified federal
19 candidate; and (4) certain "public communications," distributed 120 days or fewer before an
20 election, which refer to a clearly identified federal candidate (or political party). 11 C.F.R.
21 § 109.21(c).

22 Any one of six "conduct" standards will satisfy the third element of the three-part
23 coordination test, "whether or not there is agreement or formal collaboration." 11 C.F.R.

1 §§ 109.21(d) and 109.21(e). These conduct standards include: (1) communications made at the
2 “request or suggestion” of the relevant candidate or committee; (2) communications made with
3 the “material involvement” of the relevant candidate or committee; (3) communications made
4 after “substantial discussion” with the relevant candidate or committee; (4) specific actions of a
5 “common vendor”; (5) specific actions of a “former employee”; and (6) specific actions relating
6 to the dissemination of campaign material. 11 C.F.R. §§ 109.21(d)(1)-(6).

7 The regulations specify that a payment for a coordinated communication is made for the
8 purpose of influencing a federal election, constitutes an in-kind contribution to the candidate or
9 committee with whom or which it is coordinated, and must be reported as an expenditure made
10 by that candidate or committee. 11 C.F.R. § 109.21(b)(1).

11 2. “Political committee” status

12 TMF is a Section 527 organization that files reports with the IRS. By law, a 527
13 organization is “a party, committee, association, fund, or other organization (whether or not
14 incorporated) organized and operated primarily for the purpose of directly or indirectly accepting
15 contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1).
16 The “exempt function” of 527 organizations is the “function of influencing or attempting to
17 influence the selection, nomination, election or appointment of any individual to any Federal,
18 State, or local public office or office in a political organization,” or the election or selection of
19 presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore,
20 an organization that avails itself of 527 status has effectively declared that its primary purpose is
21 influencing elections of one kind or another.

22 TMF’s public statements, fundraising solicitations, advertisements, and public
23 communications all point even more specifically to a focus on influencing the 2004 presidential

1 election. Indeed, the only candidates mentioned on TMF's website and in advertising of which
2 the Commission is aware are President Bush or Senator Kerry. Similarly, the JVC 2004 online
3 solicitation noted above refers generally to elections on the federal, state, and local level, but the
4 only candidate it identifies is George Bush. Furthermore, as noted above, TMF's website
5 stresses the importance of compensating for the Republican's purported financial advantage and
6 getting out TMF's message during the critical period between the presidential primaries and the
7 Democratic convention.

8 Where, as here, the available information amply demonstrates that the objective of TMF
9 is to influence the 2004 presidential election and TMF has apparently raised and spent millions
10 of dollars in furtherance of that objective, it is appropriate for the Commission to investigate
11 whether, among those millions spent and received, TMF has made \$1,000 in "expenditures," or
12 received \$1,000 in "contributions." If it has, TMF is a political committee subject to the
13 contribution limitations, source prohibitions, and reporting requirements of the Act.¹ See
14 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b.

15 **3. Coordinated communications**

16 There is reason to believe that TMF satisfies the three-part coordinated communication
17 test. It meets the first prong of this test because TMF—the entity that paid for the advertisements
18 at issue—is a "person other than [the] candidate, authorized committee, political party
19 committee, or agent of any of the foregoing." 11 C.F.R. § 109.21(a)(1). TMF meets the second
20 prong (the content standard) of this test because these advertisements qualify as "public

¹ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). In its responses to the various complaints, TMF does not appear to dispute the complainants' contention that its major purpose is to engage in federal campaign activity.

1 communications” under Section 109.21(c)(4). The advertisements meet the candidate
2 identification requirement of Section 109.21(c)(4)(i), and appear to meet the timing and targeting
3 requirements of Sections 109.21(c)(4)(ii) and (iii).

4 Finally, the activities of a “former employee” provide a basis to investigate whether the
5 third prong (the “conduct” standard) of the coordinated communication test is satisfied. *See* 11
6 C.F.R. § 109.21(d)(5). The first element of the two-part “former employee” “conduct” standard
7 requires that the communication be paid for by a person (or the employer of a person, or agent
8 thereof) who was an employee of the candidate (or his opponent) who is clearly identified in the
9 communication during the current election cycle. *See* 11 C.F.R. § 109.21(d)(5)(i). Here, this
10 first element is satisfied because there does not appear to be any dispute that Jordan is a former
11 employee of the Kerry campaign, that the communications at issue identify Kerry’s opponent
12 (Bush), and that these communications were paid for by Jordan’s current “employer” (TMF
13 through its relationship with Thunder Road Group). The second element of the “former
14 employee” “conduct” standard requires that the former employee use or convey to the person
15 paying for the communication information about the candidate’s (or opponent’s) “campaign
16 plans, projects, activities, or needs” (or information used by the former employee in providing
17 services to the candidate) and that the information be “material to the creation, production, or
18 distribution of the communication.” *See* 11 C.F.R. § 109.21(d)(5)(ii). Because Jordan held the
19 position of manager of the Kerry campaign, he possessed inside information about that
20 campaign. There is a basis to investigate whether Jordan used or conveyed to TMF information
21 about the Kerry campaign’s plans, projects, activities, or needs, or information he used in
22 providing services to the candidate, and whether that information was material to the creation,
23 production, or distribution of a communication by TMF. *See* 11 C.F.R. § 109.21(d)(5)(ii). The

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1 Commission concludes that there is reason to investigate whether TMF made coordinated
2 communications with John Kerry for President, Inc.²

3 **III. CONCLUSION**

4 The factual record provides a basis on which to infer at this stage that TMF has raised
5 \$1,000 in “contributions” or made \$1,000 in “expenditures” as defined by the Act, *see* 2 U.S.C.
6 §§ 431(8) and 431(9), and that the Commission should investigate whether TMF is required to
7 register and report as a political committee. Therefore, there is reason to believe that The Media
8 Fund may have violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a
9 political committee with the Commission; by failing to report its contributions and expenditures;
10 by knowingly accepting contributions in excess of \$5,000; and by knowingly accepting corporate
11 and/or union contributions. Furthermore, there is reason to believe that The Media Fund may
12 have violated 2 U.S.C. §§ 441a and 434 by making, and failing to report, excessive
13 contributions, in the form of coordinated expenditures, to John Kerry for President, Inc.

² The activity of Jim Jordan, as a “former employee” under the regulations, provides the strongest record basis for finding “reason to believe” that TMF satisfies the “conduct” standard of the coordinated communication test; however, TMF has an additional connection to the Kerry campaign and/or the Democratic National Committee that may bear on the “conduct” standard—namely through Harold Ickes, the founder and president of TMF who is also a member of the DNC’s executive committee.